No. 2675.

United States Circuit Court of Appeals for the Ninth Circuit.

WESTERN UNDERWRITING & MORTGAGE COMPANY, a Corporation,
Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK & TRUST COMPANY, a Corporation,
Appellees.

BRIEF OF APPELLANT.

GEORGE J. STONEMAN, Phoenix, Ariz.
E. J. HENNING, San Diego, Cal.
C. A. A. McGEE, San Diego, Cal.
REESE M. LING, Phoenix, Ariz.
A. J. MORGANSTERN, San Diego, Cal.
E. E. HENDEE, San Diego, Cal.
Solicitors for Appellant.

Bower Co., Phoenix

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BRIEF OF APPELLANT.

STATEMENT OF CASE.

The Union Bank & Trust Company and the Valley Bank of Phoenix, defendants above named, were, at the time of the institution of this suit, corporations organized under the laws of the State of Arizona, for the purpose of engaging in a general banking business.

On and prior to the 27th day of January, 1912, the Union Bank & Trust Company, finding itself financially embarrassed, entered into a certain contract attached to the Bill of Complaint as Exhibit "A" fully set forth

(*Transcript of Record, Fol.* 19), under and by the terms of which in consideration of the payment by The Valley Bank of all the depositors of the Union Bank, and also all debts and obligations of every kind whatsoever, the Union Bank as signed and delivered to the Valley Bank all of its assets of whatever kind or nature; and it was particularly provided in such contract that such transfer, sale and assignment was made *"absolutely"* and without any reservations or conditions whatsoever, save and except that as between the Valley Bank and certain guarantors, such individuals guaranteed the Valley Bank against loss through this transaction.

Subsequent to the 27th day of January, 1912, to-wit: In the month of February, 1913, (*Transcript of Record, Fol.* 5) complainant, Western Underwriting & Mortgage Company, a corporation, organized under the laws of the State of California, became a stockholder in the Union Bank & Trust Company, to the extent of four hundred and seventy-two (472) shares of the preferred stock, paying therefor assets valued at, approximately, one hundred thousand dollars ($100,000).

In May, 1913, and while the contract of January 27th, 1912, was in full force and effect, and so far as plaintiff was concerned had been neither modified nor abrogated, and, while the Valley Bank of Phoenix was collecting the assets sold and assigned to it under the terms of said contract; and, as is alleged in the complaint (*Transcript of Record, Fol.* 7), using such collections for its own purposes and on its own account; and, when under the terms of such contract there could have existed no liability on the part of the Union Bank to

the Valley Bank, nor any contingent liability on the part of the individuals made parties to said contract as guarantors of the collections to be made for the Valley Bank, The Union Bank & Trust Company executed and delivered to the Valley Bank its note for one hundred and sixty-four thousand, four hundred and thirty-two dollars ($164,432); and, thereafter, on the 30th day of December, 1913, and while the contract of January 27th, 1912, had been neither abrogated nor altered, executed a new contract, under the terms of which and upon the assumption that, under the written contract of January 27th, 1912, the Union Bank was indebted to the Valley Bank, for this expressed reason and for the assumed purpose of extinguishing such indebtedness, again transferred all the assets which it had brought together since January 27th, 1912.

The Western Underwriting & Mortgage Company, after demand upon and refusal by the officers and stockholders of the Union Bank, commenced this action to set aside the acts of The Union Bank & Trust Company, in the giving of the note for one hundred and sixty-four thousand dollars ($164,000), and in the turning over of the assets under the contract of December 30th, 1913, alleging that, in December, 1913, under the terms of the written contract of January 27th, 1912, there could have existed no indebtedness or liability on the part of the Union Bank to the Valley Bank, and that the Valley Bank took the assets under the contract of December 30th, 1913, without consideration.

To this complaint, the Union Bank made no answer, other than the practical admission of the facts alleged in

the Bill of Complaint. The Valley Bank answered, pleading in substance, that, at the time of the execution of the written contract of January 27th, 1912, the Valley Bank and the Union Bank entered into a contemporaneous parol contract by the terms of which the contract of January 27th, 1912, was to be construed as a pledge and not as a sale of the assets mentioned, and that it was not intended that the written contract should embody the verbal agreement, nor that it should contain a release or discharge on the part of the Union Bank to the Valley Bank of any indebtedness caused by any deficiency which would remain upon the collection of the assets taken over by the Valley Bank under the contract of January 27th, 1912, (*Transcript of Record, Fols.* 52-54).

It further pleaded that, pursuant to the terms of the contract of January 27th, 1912, it did pay off and discharge the liabilities of the Union Bank but that it was not intended or contemplated that the Valley Bank should have any interest in the assets delivered by the Union Bank & Trust Company under such contract.

Upon the hearing of this cause in the court below, motion to strike such portions of the answer as attempted to alter, vary or change the terms of the written contract of January 27th, 1912, was by the court denied and judgment entered for defendant, The Valley Bank. upon the theory that the evidence and testimony submitted by plaintiff was not sufficient to sustain the allegations of this complaint or to entitle it to relief prayed for as against the Valley Bank (*Transcript of Record, Fol.* 74). Thereupon petition for allowance of appeal

from the order denying the motion to strike and from the judgment was allowed (*Transcript of Record, Fol.* 77) an appeal perfected by the giving of a bond in the sum of five hundred dollars ($500) (*Transcript of Record, Fols.* 89-90).

The execution of the original contract of January 27th, 1912; of the contract of December 30th, 1913; of the note of one hundred and sixty-four thousand dollars ($164,000) and the delivery to the Valley Bank by the Union Bank, under date of December 31st, of certain assets, return of which is prayed for, are all admitted not only by the answer but by stipulation. (*Transcript of Record, Fol.* 45).

The parol contract alleged to be executed contemporaneously with the contract of January 27th, 1912, is pleaded as an affirmative defense. Plaintiff relies upon the written contract of January 27th, 1912, and submits that for the reasons and upon the authorities hereinafter set forth, the court erred in entering judgment without proof of the substiution for the written contract of January 27th, 1912, of the alleged contemporaneous parol contract of the same date. Except in so far as the evidence may be useful in determining the fact that no testimony was submitted on behalf of defendant, Valley Bank, supporting the alleged contemporaneous parol contract pleaded as an affirmative defense, and, in demonstrating the theory upon which the decree was entered for defendants motion and without the introduction of any evidence in support of the parol contract. and because the decree recites that the allegations of the complaint were not supported by the evidence, the state-

ment of the evidence may, for the purpose of this appeal, be disregarded.

This appeal is prosecuted for alleged errors as set forth in the following:

SPECIFICATION OF ERRORS RELIED UPON.

I.

Because the court erred in denying complainant's motion to strike from the amended answer filed by the Valley Bank certain portions of said amended answer therein attempting to change, alter and modify the terms of the written contract of January 27th, 1912. without showing therefor a new consideration or any consideration and contrary to the rule, as defendant insists, that a written contract, the terms of which are plain and unambiguous, may not be varied, altered or modified by parol. (*Transcript of Record, Fols.* 95 *to* 106, *inc.*)

(Because the points involved in this first assignment of errors are included and will be argued in connection with the subsequent errors assigned, the first assignment of errors is not herein set forth at length.)

II.

That the Court erred in granting the motion of defendant, The Valley Bank of Phoenix, to dismiss the action and the bill of complaint of complainant, upon the grounds assigned in said motion, that complainant Western Underwriting & Mortgage Company had failed to show that the officers of the Union Bank & Trust Company did not have the right to transfer the property described in the bill of complaint to the Valley Bank of Phoenix on December 31st, 1913, in this, to-wit: That

by the ruling of this Honorable Court so made dismissing said bill of complaint, this Court necessarily predicated said ruling upon the presumed existence of a parol contract, alleged by defendant by way of affirmative defense, to have been executed contemporaneously with the written contract of January 27th, 1912, set forth in complainant's bill of complaint, and assumed as true the existence of this parol contract, without proof thereof by defendant that said contract of January 27th was not plain and unambiguous as to its terms, and without proof by said defendant of any new or other consideration for the making of said parol contract so by said defendant pleaded as a defense, and upon which said defendant relied.

III.

That this Honorable Couprt further erred in the granting of the motion of The Valley Bank of Phoenix, one of the defendants above named, to dismiss complainant's bill of complaint, for the further reason, that without proof by said defendant of the existence of a parol contract based upon a new consideration, changing and modifying the contract of January 27th, 1912, as set forth in complainant's bill of (*Transcript of Record, Fols.* 101-7) complaint, said defendant could not rely upon the contract of December 30th, 1913, as set forth in complainant's bill of complaint, and such ruling necessarily construed the contract of January 27th, 1912, to be a contract of pledge instead of a contract of sale.

IV.

That the Court erred in making and entering its decree in favor of the defendants and against the com-

plainant. Said decree being in words and figures as follows, to-wit:

"(Title of Court and Cause.)

The above-entitled cause coming on duly to be tried before the above Court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., Attorney and oSlicitor, and E. J. Henning, Esq., Attorney and Solicitor; and the defendant, The Valley Bank of Phoenix, appearing by C. F. Ainsworth, its Attorney and Solicitor; and the defendant, The Union Bank & Trust Company appearing by Struckmeyer & Jenckes, Esqs., its Attorneys and Solicitors;

"And the said plaintiff having duly submitted to this Court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case,

"And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against said defendant The Valley Bank of Phoenix.

"And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,

"NOW, THEREFORE, IT IS BY THE COURT CONSIDERED ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its action; (Transcript of Record, Fols. 102-8).

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant The Valley Bank of Phoenix, have and recover of and from the plaintiff The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of $81.00, and that said defendant have execution therefor.

"Dated this 14th day of April, 1915.

(Signed) WM. H. SAWTELLE."

ARGUMENT AND AUTHORITIES.

This appeal presents for determination two main questions. It appears, from the pleadings and the statement of facts, that this suit was brought by appellant as stockholder, in behalf of all stockholders similarly situated, against The Union Bank & Trust Company and The Valley Bank of Phoenix, for the purpose of setting aside a certain contract entered into December 30th, 1913, which contract, by its terms, made reference to a previous written contract of January 27th, 1912; such contract, designated as Exhibit 1 of the bill of complaint, is set forth in (*Transcript of Record, Fols.* 24, 25, 26 *and* 27). This contract recites that, whereas, on the 27th day of January, 1912, The Union Bank & Trust Company and the Valley Bank entered into a contract under date of January 27th, 1912, whereby the Union Bank delivered to the Valley Bank certain assets, in

consideration that the Valley Bank would pay all depositors of the Union Bank, and certain other indebtedness particularly set forth and described; and whereas, the Valley Bank was guaranteed against loss by certain individuals who agreed as guarantors that, if the Union Bank at the end of three years should suffer any loss by reason of the transfer to it of the assets of the Union Bank, they would reimburse the Valley Bank; and whereas, the Valley Bank held the note of the Union Bank for $164,432.46, dated May 17th, 1913, falling due January 27th, 1915, given by the Union Bank *in liquidation of its indebtedness to the Valley Bank under said contract upon the date of its said execution;* and whereas there remained unpaid *upon said indebtedness* the sum of $103,000.00, The Union Bank was willing to make a further transfer and assignment of certain assets appearing by said contract to have been acquired by it since the execution of the contract of January 27th, in consideration that the Valley Bank should release the Union Bank from any further claim or liability to it *under the contract of January 27th*, 1912, the Union Bank under this contract of December 30th, 1913, transferred and set over unto the Valley Bank all such other property mentioned in a schedule attached to it and which had been by the Union Bank acquired subsequent to January 27th, 1912.

It is further provided in this contract that, in consideration of such second transfer and assignment (and notwithstanding the reference in this contract to the contract of January 27th, 1912, from which it may be determined there could have existed no indebtedness

from the Union Bank to the Valley Bank), the same guarantors who under the contract of January 27th, 1912, guaranteed the Valley Bank against loss were still to be held.

It is, we think, apparent that under the plain terms of the written contract of January 27th, 1912, not only did there exist no indebtedness from the Union Bank to the Valley Bank after the delivery by it to the Valley Bank unconditionally and absolutely of the assets mentioned in that contract, but that there could have existed no contingent liability on the part of guarantors until January 27th, 1915.

We submit it also is plainly apparent that the Valley Bank must have confessed judgment in this action, except for its allegation set up as an affirmative defense that its right to take over further assets from the Union Bank under the contract of December 30th, 1913, is predicated upon some contract other than the contract of January 27th; this it has attempted to do by pleading a contemporaneous parol contract entered into on the 27th day of January, 1912, which contract, if now permitted to be effective for any purpose, completely nullifies and sets at naught the intent and language of the written contract to the extent of declaring that the written contract did not mean what it said; that it was not an "absolute" sale and transfer of its assets but was instead a pledge, and the creation of an agency on the part of the Union Bank for the collection only of its assets; in fact, it is specially alleged in the affirmative answer of the Valley Bank that, at the time of the execution of the written contract of January 27th, 1912,

there was, so far as this appellant (being a stockholder of the Union Bank) was concerned, and as to all other stockholders, except the guarantors themselves under that contract, an intention that the written contract should not express the true arrangement. (*Folios* 51, 52 *and* 54). The pleading, in this respect, is, from our point of view, equivalent to an admission that, if under the terms of the written contract, the Valley Bank had made a profitable contract, it should retain for itself the profits, upon the assertion that the contract of January 27th was an absolute and unconditional sale; but that, if it should so happen the Valley Bank had entered into a losing contract, they should be permitted to rely upon a secret, undisclosed and, as to the stockholders of the Union Bank, a fraudulent parol contract completely nullifying the terms of the written contract, whereby the Valley Bank was created the agent only of the Union Bank for the collection of the assets taken over by it from the Union Bank.

It must be assumed that neither the Western Underwriting & Mortgage Company nor any other purchaser of stock in The Union Bank & Trust Company, would have purchased for any consideration, with the knowledge that not only had the assets of the Union Bank been unconditionally sold by the contract of January 27th, but that there was a contingent liability depending upon the want of success on the part of the Valley Bank in reducing its assets to cash; this is particularly true in view also of the fact that, under the terms of the written contract, the Union Bank had no voice in the collection of the assets; it had no equities which it might

enforce; it had no claim against the Valley Bank on account of any profits which might have accrued and, finally, that the Valley Bank protected itself in the transaction against loss, not only by taking over assets of a face value of much more than it would have to pay on account of the indebtedness of the Union Bank, but was guaranteed by individual guarantors against any loss.

We very urgently submit, for the consideration of this court, the further fact that the decree was erroneous in that at the time it was directed upon motion of appellee, the trial court had before it evidence only of the existence of the written contracts and there was absolutely no evidence to support the affirmative defense of a contemporaneous parol contract, without the existence of which it must be conceded the written contract of December 30th, 1913, referring as it does and being predicated upon the terms of the contract of January 27th, was without consideration and as to the stockholders of the Union Bank, void.

For the same reason, we submit that the trial court erred in finding that the officers of the Union Bank, occupying a position of trust towards its stockholders, could either enter into a secret, undisclosed and fraudulent parol contract such as is relied upon as a defense by the Valley Bank, or so construe the plain and unambiguous terms of the written contract of January 27th as to make binding upon the Union Bank or its stockholders the contract of December 30th, 1913.

If it be true, as indicated by the trial court, that the Union Bank is bound by the construction which through

its directors it placed upon the contract of January 27th, then it must follow that the directors, no matter how fraudulent their action may have been, and without regard to the rules of construction of written contracts laid down by the courts, may, for their own purposes or, as in this case, for their own protection, set aside the terms of a plain and unambiguous written contract to the injury of stockholders and others dealing with the company who may have relied upon its terms.

In this connection, attention is directed to the fact that the guarantors, under the written contract of January 27th, being J. F. Cleaveland, John P. Orme, Geo. H. N. Luhrs and J. M. Swetnam, (*Transcript of Record, Fol.* 29) were as to each and all of them at the time of the execution of the contract of January 27th, officers and directors of The Union Bank & Trust Company (*Transcript of Record, Fol.* 21); and to the further fact that such guarantors, who at the time of the execution of the contract of January 27th were officers of the Union Bank, did, by the execution of the contract of December 30th, attempt to relieve themselves of all or a large portion of a contingent liability to the ~~Union~~ Valley Bank, determinable only on January 27th, 1915.

We submit that the officers of the Union Bank, acting in the dual capacity of guarantors of the Valley Bank, had no right to use the credit or assets of the stockholders in such a manner and, to permit them so to do, upon the theory that the corporation and stockholders therein may be bound by the construction which its officers for their own protection may, without consideration of the rights of the stockholders, place upon a con-

tract plain and unambiguous in its terms, would be to open wide the door to all directors of all corporations to shift upon the shoulders of stockhlders respnsibility for individual liability in utter disregard of written representations theretofore made by them in behalf of the company and its stockholders, and upon which all persons, including its stockholders, had a right to rely. From the point of view of the appellee, this was an unconscionable contract, in that it represented facts which did not exist and under which, as before mentioned, the Valley Bank might take advantage of all profits and be protected against all loss.

To what has been said may be added the statement that by the decree complained of, the guarantors of the contract of January 27th, 1912, are permitted by their own act as directors of the corporation to represent to the stockholders, by the execution of the written contract of January 27th, that the corporation had discharged its liability to its creditors and depositors, and, at the same time and by the same act, secretly withdraw this assurance and protect themselves against a contingent liability, which might be determined to exist against them as individual guarantors against loss by the Valley Bank.

Differently stated, the directors of the Union Bank, having the sole control and management of its affairs, voluntarily assuming a possible responsibility for loss arising out of their misconduct, have on the one hand publicly declared that the stockholders were relieved from responsibility arising out of their mismanagement, and secretly agreed between themselves that notwith-

standing the corporation and its stockholders *should* be held responsible, in complete disregard of their declaration, under the terms of the written contract of January 27th. This, we assert, is not a matter in which the stockholders are bound by the acts of the directors of the corporation, resulting from an erroneous exercise of their discretion, but is a case where it distinctly appears the directors were guilty of a gross misrepresentation in a matter where no discretionary power existed.

We deem it unnecessary to cite authority to the effect that a corporation is bound by the act of its agent or directors only when they act within the scope of their authority. Upon this principle, we assert that the directors of The Union Bank & Trust Company had no express or implied authority as the agents of the corporation to construe a contract, which, upon its face, is a contract of absolute and unconditional sale, to be a contract of pledge or the creation of an agency, as was the effect of the action of the Board of Directors in the execution by it of the contract of December 30th, 1913.

Moreover, the last mentioned contract made no reference to any existing parol contract but was predicated entirely upon the written contract of January 27th, 1912, and upon the unauthorized assumption as readily appears from an inspection of the contract of January 27th, that there existed by the terms thereof a liability fixed or contingent on the part of the Union Bank to the Valley Bank.

The act, we repeat, is not even an instance where the directors have abused their discretion. It is an instance where the directors acted in a matter permitting

the exercise of no discretion. We deem it a very significant fact that, in the attempted acquisition by the Valley Bank of the assets of the Union Bank under the contract of December 30th, reference was made to the written contract of January 27th, 1912, and nowhere, except in the pleadings and not in the contract of December 30th itself, is reference made to or reliance placed upon the provisions of a parol contract to justify the subsequent taking over by the Valley Bank of the assets of the Union Bank; nor is it claimed that the Board of Directors of the Union Bank on the 30th day of December, 1913, justified their action by any knowledge on their part of the existence of a parol contract of the tenor and meaning alleged in the affirmative defense of the Valley Bank. (*Transcript of Record, Fols.* 25-28,*inc.*Q

Not only is this true, but the contract of December 30th does not even recite that it is the result of action by the Board of Directors; IT WAS SIGNED BY JOHN P. ORME AS PRESIDENT, WHO IS A GUARANTOR UNDER THE CONTRACT OF JANUARY 27th, WITHOUT RECITATION IN THE CONTRACT OF HIS PURPORTED AUTHORITY.

The warranty of the guarantors is independent of the Union Bank, for it is provided that, in the event the guarantors shall pay any deficiency, the Valley Bank shall re-assign, transefr and deliver to the guarantors all assets not reduced to cash then in the hands of the Valley Bank. (*Fol.* 21).

Finally, and before the citation of authorities, we respectfully suggest the assumption is by no means un-

warranted that, had this case been permitted to proceed to the extent of requiring defendant to prove the existence of the parol contract, appellant might have proven by the guarantors themselves that no such parol contract existed; that the written contract of January 27th was, as is therein expressed in terms, an absolute, unconditional sale by the Valley Bank not coupled with the contemporaneous parol contract and without reservation of any kind. The state of the record only prevents us from asserting this to be a fact. We, therefore, submit that this case should be reversed.

First: Because the decree was rendered in favor of defendant, without proof of the existence of a parol contract, which is the vital and material fact pleaded in defense.

Second: That, even had the attempt been made to prove a parol contract, evidence thereof would have been inadmissable under the rule laid down in the following cases cited as:

AUTHORITIES.

The Union Bank is not bound by the fact that the assets transferred to the Valley Bank, under the terms of the written contract, might have been carried upon its books as assets of the Union Bank nor by the fact that the Comptroller may have directed the Union Bank to execute its note in admission of an alleged indebtedness due the Valley Bank, for, if there existed no indebtedness from the Union Bank to the Valley Bank, the directors and officers of the Valley Bank had no right to charge the stockholders with such indebtedness, nor had the Valley Bank or the State Comptroller

the right to create evidence of the indebtedness where none existed.

The evidence of indebtedness from the Union Bank to the Valley Bank must rest upon the alleged parol contract. It becomes necessary, therefore, before any testimony is admissable to show such indebtedness, that the parol contract shall be established, because, except for the parol contract, there existed no indebtedness under the terms of the written contract and the burden is upon the party asserting a modification of a written contract by subsequent or contemporaneous parol agreement to show such modification.

Manning vs. Seaboard Paint Co., 87 N. Y. S. 232;
Boyes vs. Ramsdell, 55 Pac. 538.

Even if this were true, it is part of new matter set up by way of affirmative defense upon which the decree could not be predicated without evidence to support it.

For the convenience of the court and not for the purpose of citing elementary law, we submit herewith what we take to be the rule governing the admission of parol evidence to vary, alter, change or contradict the terms of a written contract:

> "The rule has frequently been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself. It has been seen, however, from the examples already given that in numerous cases much greater latitude has been given to the introduction of parol evidence than is implied in the statement just given. It will be found that nearly all, if not all, the illustrations given in the last section recognize the general rule that the written con-

tract must govern, and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. It will also be found that in the cases where evidence of the declarations of parties, has been received the language of the writing admitted of more than one construction, either upon its face or as explained by the parol evidence concerning the surrounding facts or identifying the subject matter or the parties. Where the language of the writing *does* thus admit of more than one construction, there is considerable authority for the view that such language may be construed by the court in the light of the statements and acts of the parties contemporaneous with and subsequent to the contract, in other words, that such language and statement of the parties may be used to explain the ambiguity.

"But it must be borne in mind that, although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language. It is no doubt true that, with the aid of the proper extrinsic evidence, instruments are construed and made effective which could not otherwise be construed to have any effect at all; and in these cases a very different construction is given from that which would follow from the bare inspection of the writing. But the court cannot give effect to any intention which is not expressed by the language of the instrument, when examined in the light of facts that are properly before the court. For still stronger reason such evidence cannot be received to contradict the clear and settled meaning of the contract. And it is only in exceptional cases that the statement at the time of execution of the contract

and prior negotiations between the parties will be received."

Jones on Evidence, Edition De Luxe; p. 571, Par. 454;
Farmers Loan & Trust Co. v. Commercial Bank of Racine, 15 Wis. 424, 82 Am. Dec. 689;
Jones v. Swearingen, 42 S. C. 58;
Naughton v. Elliott, 68 N. J. Eq. 259; 59 Atl. 869;
McAfferty v. Conover, 7 Oh. St. 99; 70 Am. Dec. 57;
Griffin v. Hall, 115 Ala. 482; 22 So. 162.
Matters which appear in the writing, not to be excluded by parol evidence;
Lawrence v. Comstock, 124 Mich. 120; 82 N. W. 808;
King v. New York & Cleveland Gas Coal Co., 204 Pa. St. 628; 54 Atl. 477;
The Delaware, 14 Wall. 579;
Gilbert v. Moline Plough Co., 119 U. S. 491;
Corse v. Peck, 102 N. Y. 513;
Elofrson v. Lindsay, 90 Wis. 203; 63 N. W. 98.
See many cases cited, 9 Encyc. of Ev. 375-377.

The rule is more forcibly laid down and has been the subject of more frequent construction in cases involving parol representations antecedent to or contemporaneous with the execution and delivery of policies of insurance.

See Northern Assurance Co. vs. Grandview Bldg. Association, 183 U. S. 308; 46 L. Ed. 213-23;
Conn. Fire Ins. Co. vs. Buchanan, 141 Fed. C. C. A. 877; 4 L. R. A. (N. S.) 758.

An instructive case, with a very extensive note, is found in the case of

Haapa vs. Metropolitan Life Insurance Co., 150

Mich. 467; 114 N. W. 380; 16 L. R. A. (N. S.) 1165.

The answer of Valley Bank containing no set-off or counter-claim under Equity Rule No. 31, the new or affirmative matter therein is deemed denied.

Respectfully submitted,

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E. J. HENNING, San Diego, Cal.
C. A. A. McGEE, San Diego, Cal.
REESE M. LING, Phoenix, Ariz.
A. J. MORGANSTERN, San Diego, Cal.
E. E. HENDEE, San Diego, Cal.
Solicitors for Appellant.

Dated at Phoenix, Ariz., February 1st, 1916.

Service three copies admitted February 1st, 1916.

C. F. AINSWORTH,
Solicitor for Appellee,
Valley Bank of Phoenix.